SUPREME COURT, U. S.
JAN 2
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-825

MERCY N. CLINCHER, ET AL.,
Petitioners,

v.

THE UNITED STATES, AND THE
STATES OF ARIZONA AND MONTANA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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January, 1975

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INDEX

		Page
Opinion Below		1
Jurisdiction		1-2
Questions Presented		2
Statutes Involved		2-4
Statement		4-5
Reasons For Granting The Writ		5-10
Conclusion		11
Appendix A	Opinion, *Clincher* v. *United States*, No. 25-73 (Ct. Cl., filed July 19, 1974)	1a-8a
	and	
	Order, *Clincher* v. *United States*, No. 25-73 (Ct. Cl., filed Oct. 4, 1974)	9a-10a
Appendix B	Letter of Department of Revenue, State of Montana, to Clifford Young Bear, No. SS 501-32-2833 (June 12, 1974)	11a-12a

TABLE OF AUTHORITIES

Statutes: Page

4 U.S.C. §§ 101 *et seq.* (61 Stat. 641) ..... *passim*
5 U.S.C. § 5517 (66 Stat. 765) 3, 4, 8
28 U.S.C. § 1255(1) (62 Stat. 928) 2
28 U.S.C. § 2501 (62 Stat. 976) 9
Rev. Code Mont. (R.C.M.) § 84-4956 (1947) 10

Cases:

Freeman v. *Morton*, 499 F.2d 494 (D.C. Cir. 1974) 9
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973) 4, 5, 6, 7
Morton v. *Mancari*, 42 U.S.L.W. 4933 (June 17, 1974) 7
Warren Trading Post Co. v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965) 6
Your Food Stores, Inc., v. *Village of Espanola*, 68 N.M. 327, 361 P.2d 950 7

Legislative Materials:

S. Rep. No. 1625, 76th Cong., 3d Sess. (1940) 6, 7
84 Cong. Rec. 10685 6

Administrative Opinions:

Applicability of State Sales Taxes to Purchases Made Out of Restricted Funds of Individual Indians, 58 I.D. 562 (1943) 7

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Mercy N. Clincher, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A at 1a-8a, *infra*) is unreported. The order of the court (App. A at 9a-10a, *infra*), amending the opinion is unreported.

JURISDICTION

The judgment of the court was entered on July 19, 1974, and was amended by an order entered October 4,

1974. The jurisdiction of this Court is invoked under 25 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the United States is liable for amounts it withheld from the wages of federal employees for state income taxes and paid to the states where (a) the employees are American Indians; (b) the incomes were earned solely within the boundaries of Indian reservations and, as such, are not subject to state income taxation; and (c) there are no adequate state remedies.

STATUTES INVOLVED

The Buck Act, Act of July 30, 1947, ch. 389, 61 Stat. 641 (4 U.S.C. §§ 101, *et seq.*), provides in pertinent part:

> "§ 105. State, and so forth, taxation affecting federal areas; sales or use tax
>
> * * * *
>
> "106. Same; income tax
>
> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.
>
> * * * *
>
> "108. Same; jurisdiction of United States over Federal areas unaffected

"The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area.

"109. Same; exception of Indians

"Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

The Withholding Act, Act of July 17, 1952, ch. 940, 66 Stat. 765, as amended by the Act of September 6, 1966, ch. 55, 80 Stat. 478-79 (5 U.S.C. § 5517), provides:

"§ 5517. Withholding State income taxes

"(a) When a State statute—

"(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State; and

"(2) imposes the duty to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute *in the case of employees of the agency who are subject to the tax* and whose regular place of Federal employment is within the State with which the agreement is made. The agreement may not apply to pay for

service as a member of the armed forces. [Emphasis added]

"(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency.

"(c) For the purpose of this section, 'State' means a State or territory or possession of the United States."

STATEMENT

Petitioners are seven American Indians who are enrolled in Indian tribes recognized by the Government and who have worked for the United States on one or more Indian reservations. The Withholding Act of 1952, 5 U.S.C. § 5517, authorizes in certain instances the head of a federal agency to withhold and pay over wages of federal employees for state income taxes, but only "in the case of employees . . . who are subject to the tax. . . ." Income earned by Indians residing and working on an Indian reservation is not subject to state taxation. Buck Act, Act of July 30, 1947, 4 U.S.C. § 109; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 176-77 (1973).

The United States, however, withheld portions of the Indians' wages earned while residing and working on Indian reservations and paid the same over to various states.

The Indians sued the United States in their own behalf and on behalf of all other American Indians similarly

situated to recover the amounts so withheld from their wages. The United States interpleaded as third party defendants only two of the several states involved, Arizona and Montana. The Indians and United States each moved for summary judgment, with the United States also praying that any judgment against it be made a judgment against the two states. The states moved to dismiss.

A three-judge panel of the Court of Claims granted the motions of the United States and the states and dismissed the case, holding the Indians had no claim for relief.

The Indians moved for a rehearing *en banc*. The court modified its opinion, but denied the motion by order dated October 4, 1974.[1]

REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Claims undercuts the decision of this Court in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

In *McClanahan*, this Court held that state tax laws do not extend to Indians on reservations. In doing so, the Court reaffirmed that Congress, in 1947, by enacting the Buck Act, 4 U.S.C. §§ 101, *et seq.*, continued to protect reservation Indians from the taxing jurisdiction of the states.

Section 109 of the Buck Act provides:

> "Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

This Court said in *McClanahan*, *supra*, at 176-77:

---

[1] App. A at 9a-10a, *infra*.

"Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C. § 104 *et seq.*, which provides comprehensive federal guidance for state taxation of those living within federal areas. Section 106(a) of Title 4 U.S.C. grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that "[n]othing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." To be sure, the language of the statute itself does not make clear whether the reference to "any Indian not otherwise taxed" was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 4 (1940); 84 Cong. Rec. 10685, and this Court has so interpreted it. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. at 691 n. 18. While the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization." (Footnote omitted)

As the Court noted, it previously had affirmed the exemption of reservation Indians from state taxation in *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965). In that connection, the Court observed:

> "The Buck Act, now 4 U.S.C. §§ 105-110 (1964 ed.), in which Congress permitted States to levy sales or use taxes within certain federal areas, has been interpreted by what appears to be the only court to consider the question before this case, and by the Interior Department, as not applying to Indian reservations. *Your Food Stores, Inc.* v. *Village of Espanola*, 68 N. M. 327, 334, 361 P. 2d 950, 955-956; 58 I.D. 562. Cf. 4 U.S.C. § 109 (1964 ed.), excepting taxes on Indians from the scope of the Act. We think that interpretation was correct. See S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 3." (380 U.S. at 691 n.18)

This case is the only practical way that *McClanahan* can be given meaning for the years that the United States took its Indian employees' wages and turned them over to the states for income taxes. But the Court of Claims refused to give life to *McClanahan*. Indeed, the Court of Claims totally ignored the critical statute, the Buck Act, and treated the matter as if the Indian employees were subject to state taxes and this was simply another case of taxpayers pursuing state remedies to obtain a refund.

2. This case presents an important question of general application to a substantial segment of American Indians.

The petitioners and the class they represent[2] constitute a substantial segment of working American Indians. Because of their minority status and their special relationship to the United States, the Government has conferred on them a preferential right of employment in the Bureau of Indian Affairs. This policy has been in force at least as far back as 1834. *Morton* v. *Mancari*, 42 U.S.L.W. 4933 (June 17, 1974).

---

[2] The decision may have been influenced by the fact this was a class action. Whether this case was a proper class action was never litigated below.

The decision below, by sanctioning the Government's withholding of the Indians' wages, cannot be reconciled with the Congressional policy of preferential right of employment and the Indians' federal right to be free from state jurisdiction, including state tax laws.

3. The decision below is clearly erroneous.

A. The decision of the Court of Claims ignores the Buck Act and misapplies the Withholding Act.

The Court of Claims, in reaching its decision, ignored the Buck Act, the controlling federal statute. Further, the Court compounded its error by erroneously applying the Withholding Act of 1952 to federal Indian employees on reservations. The Court concluded "[w]hat we have here is a case where the collection of a refund of any excess of withholding over tax liability is entirely between the taxpayer and the state." (App. A at 7a, *infra.*)

This is not a case of taxpayers seeking a refund of excess taxes withheld. Here the Indians seek recovery of their wages wrongfully withheld by the United States and paid to third parties in violation of a federal statute. Had the United States withheld the Indians' wages and retained them, rather than turning them over to third parties, the Indians would be entitled to recover in the Court of Claims. The United States cannot escape its liability from wrongful conduct by a Pontius Pilate act of turning over the Indians' wages to third parties. Yet this is the result reached by the Court of Claims, and to reach that result the Court of Claims ignored the very statute designed to protect reservation Indians from state taxation.

B. *The Court of Claims erred when it relegated reservation Indians to state jurisdiction.*

Most states impose a three-year statute of limitations. By directing the Indians to state courts, the court below, for all practical purposes, deprived them of a remedy provided by the six-year statute of limitations in the Court of Claims (28 U.S.C. § 2501). Thus, this suit is essential in order for the Indians to obtain the compensation they earned and which the United States took for the excess time period by which the Court of Claims' six-year statute of limitations exceeds state statutes of limitations.

The decision below also would compel a multiplicity of suits in a number of states—a result to be avoided. In addition, an extra burden is cast on a substantial segment of the class that has worked on reservations in more than one state. As with other federal employees, a number of petitioners, and other Indian employees similarly situated, have been transferred from reservation to reservation in different states during the course of their employment. The effect of the Court of Claims' holding is to compel numerous Indians, each for himself, to initiate suits in more than one state. The time, expense and human effort necessary to pursue this sort of piecemeal justice represents a totally unconscionable burden, especially when placed upon the innocent but aggrieved party.

Further, the individual amounts involved in this suit are small and are far outweighed by the attorneys' or accountants' fees and litigation costs necessary to sustain individual refund actions.[8]

---

[8] The Court of Appeals for the District of Columbia noted that "[i]n 1970 only a little more than half of all employees [of the Bureau of Indian Affairs] were Indians and the majority of these were employed in the lower ranking jobs." *Freeman* v. *Morton*, 499 F.2d 494, 501 n.20 (D.C. Cir. 1974).

Finally, at least with one state, Montana, its procedures are discriminatorily applied to Indians. Montana has a five-year statute of limitations. Rev. Code Mont. § 84-4956 (1947). However, at oral argument before the Court of Claims, Montana counsel informed the court that in the case of reservation Indians, the state tax department arbitrarily imposes a three-year limitation. In addition, Montana counsel informed the court that it permitted refunds under this shortened period only if the Indian seeking the refund was also enrolled on the reservation where he earned his wages. (*See* App. B at 11a-12a, *infra*).

It is precisely this sort of discriminatory treatment by states which emphasizes the continuing need for the special relationship between Indians and the United States and why the federal government retains jurisdiction to the exclusion of states.

The decision below is in total conflict with federal law and policy and results in giving Indian wages to states.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Claims in *Clincher v. United States*, No. 25-73 (July 19, 1974).

Respectfully submitted,

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January, 1975

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 25-73

(Decided July 19, 1974)

MERCY N. CLINCHER, ET AL.,

v.

THE UNITED STATES; STATES OF MONTANA AND ARIZONA,
Third Party Defendants

Marvin J. Sonosky, for plaintiffs. *Richard A. Baenen*, attorney of record for plaintiffs.

David W. Miller, with whom was *Assistant Attorney General Wallace H. Johnson*, for defendant.

Robert W. Corcoran, with whom was *Edward Jene Bell*, of counsel, for the State of Montana.

James D. Winter, with whom was *Gary K. Nelson*, of counsel, for the State of Arizona.

Before SKELTON, NICHOLS, and KASHIWA, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT; AND THIRD PARTY DEFENDANT'S MOTIONS TO DISMISS

NICHOLS, *Judge*, delivered the opinion of the court:

Plaintiffs are seven American Indians who are, or have been, United States employees on Indian reservations. Invoking *McClanahan* v. *Arizona State Tax Comm.*, 411 U.S. 164 (1973), they bring this suit to recover amounts withheld from their wages by the United States for state income taxes and paid over to either the State of Montana or the State of Arizona. They did not protest the withholdings, which ceased after *McClanahan*, and they have not requested refunds under state practice. Pursuit to Rule 41, Montana and Arizona have been added to the suit as third party defendants. The United States moves for summary judgment. Also it prays for judgment against these third party defendants in the amount of any judgment that may be entered in the plaintiffs' favor against the United States. Arizona and Montana have filed motions to dismiss plaintiffs' petition. We have subject matter jurisdiction pursuant to 28 U.S.C. § 1491, since the plaintiffs are suing for amounts due them as pay earned during their United States Government employment. *Ray* v. *United States*, 197 Ct. Cl. 1, 453 F.2d 754 (1972).

Plaintiffs ask that this case be certified as a class action or form of a class action. In the alternative they have filed a motion for leave to add 15 additional parties plaintiff, all of whom are employed by the United States on Indian reservations not within the boundaries of Arizona or Montana.

In the recent case of *Quinault Allottee Ass'n* v. *United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972), 14 A.L.R. Fed. 751, we held that we have the power to entertain class actions. In that case we decided not to adopt a rule complementary to Rule 23 of the Federal Rules of Civil Procedure. Recognizing that F.R.C.P. 23 is controversial, and that our needs are unlike those of the District Courts, we decided in *Quinault*, to handle class actions on a case

by case basis, deferring promulgation of a rule of our own. *See, also,* Annot., *"Maintenance of Class Actions In United States Court of Claims"*, 14 A.L.R. Fed. 760 (1973); Iadarola, *Class Suits And The Court of Claims—Is The Court Now Ready For A Rule*, 31 Fed. B.J. 225 (1972).

It is certainly fairer to the members of the class not to invite them on board a sinking ship, as this, we hold *infra*, is. Moreover, the class, according to plaintiffs, numbers about 7,000, employed on different reservations in several different states. It appears to be common ground that liability, if any, of the United States passes through to the third party defendants. Should we hold, as we do not, that the United States can be initially liable as a stakeholder who paid the wrong party, the paramount issues would then become the liability of each individual state in light of relevant treaties and statutes. *McClanahan, supra*, at 173. Issues might be different for different states, and for different tribes or reservations in the same state. Attorneys General of different states might employ different strategy. Thus the class action as proposed would be an unwieldly mass with the single common initial issue outweighed by a multiplicity of subsequent diverse issues. *Quinault, supra*. The normal and presently ongoing pursuit of refund claims before state agencies and courts appears cleaner, simpler, and more economical. The request for class action status is denied.

For the same reason we also deny plaintiffs' motion to add additional parties plaintiff. Such motion seeks to add individuals from Oregon, Idaho, South Dakota, California and Colorado. If we granted this motion the United States asks that we add the states listed above as third party defendants prior to ruling on the merits. Undoubtedly, these states would want to express their views to this court. This would unnecessarily complicate

and delay the present litigation. As stated, we perceive no assurance that the legal issues will be the same for other states as they are for Arizona and Montana.

The test case, brought by one or a few plaintiffs, has been the traditional method of litigating rights of Government employees in this court. We see no reason why the method is not sufficient here.

The plaintiff, *McClanahan*, was a Navajo Indian who resided on, and derived all her income from within the Navajo reservation. She sued in the state courts to recover $16.20 withheld from her wages as Arizona State income taxes, and losing there, went to the United States Supreme Court. Relying upon Federal statutes, and a treaty between the United States and the Navajos, the Supreme Court held that Arizona was without jurisdiction to tax her income earned on the reservation.

Plaintiffs argue that where the United States owes money to one party but mistakenly pays it to another party, the first party is entitled to recover those sums from the United States. Cited as authority are *Fireman's Fund Ins. Co.* v. *United States*, 190 Ct. Cl. 804, 421 F.2d 706 (1970); *Stamer* v. *United States*, 148 Ct. Cl. 482 (1960) and *Central Nat'l Bank of Richmond* v. *United States*, 117 Ct. Cl. 389, 91 F. Supp. 738 (1950). These cases are not relevant to the case at bar, since none concerns the situation where the United States as an employer, withholds state income taxes. No case has been cited to us, nor have we been able to find any cases holding that an employer is liable to its employee for income taxes erroneously withheld from the employee's wages. Looking the other way, but not directly in point, is *Lung* v. *O'Cheskey*, 358 F. Supp. 928 (D.N. Mex., (3 judge court)), *aff'd* 414 U.S. 802 (1973).

The United States withholds state income taxes from its employees as a result of contracts entered into with

states pursuant to 5 U.S.C. § 5517. In relevant part that statute provides as follows:

§ 5517. WITHHOLDING STATE INCOME TAXES

(a) When a State statute—

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State; and

(2) imposes the duty to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. * * *

(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency.

We are certain that Congress could not have intended this provision to be interpreted so as to impose a greater burden on the United States than that imposed on a

private employer. This is evident from subsection (b) of the statute.

We hold that the United States is not liable to its Arizona and Montana Indian employees for state income taxes erroneously withheld from their salaries because a private employer would not be under either Arizona or Montana law. Such liability is expressly eliminated by Ariz. Rev. Statutes § 43-188(g), and Rev. Codes of Montana § 84-4947:

Ariz. Rev. Statutes, § 43-188

(g) Liability for failure to withhold; penalty for failure to remit.

(1) The employer shall be liable to the tax commission for the payment of the tax required to be deducted and withheld under this section, and the employee shall not thereafter be liable for the amount of any such payment, *nor shall the employer be liable to any person or any employee for the amount of any such payment.* For the purpose of making penalty sections of this title applicable, any amount deducted or required to be deducted and remitted to the commission under this section shall be considered the tax of the employer and with respect to such amounts he shall be considered as a taxpayer. (Emphasis supplied.)

Rev. Code of Montana, § 84-4947

84-4947. Amount withheld considered as tax collected. All amounts deducted and withheld shall be considered as a tax collected under the provisions of this act, and *no employee shall have any right of action against his employer in respect to any moneys so deducted and withheld from his wages* and paid to the state of Montana in compliance or intended compliance with this act. (Emphasis supplied.)

These provisions are apparently patterned after I.R.C. of 1954, § 3403, or its predecessor I.R.C. of 1939, § 1623. The former is set out below:

Internal Revenue Code, 1954, § 3403

SEC. 3403. LIABILITY FOR TAX.

> The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and *shall not be liable to any person for the amount of any such payment.* (Emphasis supplied.)

Arizona also provides that a taxpayer, from whose pay sums are withheld, has the same remedies as other taxpayers § 43-188(i). This appears to be implicit as to Montana. At any rate, in this court it was not denied that the involved Indians had available to them the customary and usual remedies to recover state income taxes withheld contrary to *McClanahan*, to the extent state statutes of limitations have not run. Both states are actively processing refund claims based on *McClanahan*, though the position of Montana, not yet tested administratively, or in its courts, is to deny *McClanahan* full retroactive effect.

Should there be any state that expressly or by implication imposes upon the private employer the duty to monitor the tax liability of its employees, and refrain from any withholding contrary to correct views as to the employee's tax liability, whether or not the employee has so requested, that would present us with a situation not before us here, and one as to which we express no opinion. What we have here is a case where the collection of a refund of any excess of withholding over tax liability is entirely between the taxpayer and the state. The plaintiffs are not incompetent. As their counsel admitted, there is nothing in their claims, if valid, that would not be equally valid for any non-Indian Govern-

ment employee, if despite some legal immunity from state taxation, the Government withheld moneys and paid them over to the state in error as state taxes.

Plaintiffs' cause of action is also barred by their failure to exhaust state administrative remedies. In both states a taxpayer is required to file a claim for refund with a state administrative taxing authority. Ariz. Rev. Statutes § 43-184(b)(1); Rev. Codes of Montana § 84-4956. A condition to a taxpayer's obtaining judicial review in both states is *inter alia* a denial of the taxpayer's claim for refund by the administrative taxing authority. Ariz. Rev. Statutes §§ 43-184(b)(1), 43-186(b); Rev. Codes of Montana §§ 84-4922, 84-4923.1. Plaintiffs apparently have never filed a claim for a refund with either of the state taxing authorities. This precludes our granting them any relief since in the absence of a statutory exception a litigant must exhaust state administrative remedies prior to challenging a state action in a Federal court. *Gilchrist* v. *Interborough Rapid Transit*, 279 U.S. 159 (1929); *Porter* v. *Investors Syndicate*, 286 U.S. 461 (1932), *aff'd on rehearing*, 287 U.S. 346 (1932); *Carson* v. *Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957); *Baron* v. *O'Sullivan*, 258 F.2d 336 (3d Cir. 1958).

We therefore grant the United States' motion for summary judgment, and third party defendants', States of Arizona and Montana, motions to dismiss. The plaintiffs' motion for summary judgment is denied. The petition is dismissed.

IN THE UNITED STATES COURT OF CLAIMS

No. 25-73

MERCY N. CLINCHER, ET AL.

v.

THE UNITED STATES;
STATES OF MONTANA AND
ARIZONA, THIRD PARTY DEFENDANTS

Before SKELTON, *Judge*, Presiding, NICHOLS AND KASHIWA, *Judges*.

ORDER

This case comes before the court on plaintiffs' motion, filed August 9, 1974, pursuant to Rules 151 and 7(d), for rehearing and suggestion for rehearing *en banc*. Upon consideration thereof, together with the responses in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d) which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151,

IT IS ORDERED that plaintiffs' said motion for rehearing be and the same is denied.

IT IS FURTHER ORDERED that the slip opinion entered herein on July 19, 1974, be and the same is corrected and amended as follows:

1. The sentence beginning the paragraph on lines 29 and 30 of page 6 of the said slip opinion reading.

"Plaintiffs' cause of action is also barred by their failure to exhaust state administrative remedies." is deleted and the following sentence is inserted in lieu thereof:

> Plaintiffs' proper remedy is to follow the administrative procedures prescribed by the two states.

2. The sentences starting with the words, "This precludes our granting them * * *", appearing on lines 39 and 40 of page 6 of the said slip opinion, and continuing through line 8 of page 7 thereof (ending with the citation of *Baron* v. *O'Sullivan*), are deleted and stricken.

BY THE COURT

/s/ Byron Skelton
Byron Skelton
Judge, Presiding

Oct. 4, 1974

APPENDIX B

[SEAL]

STATE OF MONTANA

DEPARTMENT OF REVENUE

Mitchell Building

Helena, Montana 59601

June 12, 1974

Clifford Young Bear
Brockton
Montana 59213

SS 501-32-2833

Re: I.T. 1973—Tax Due	$63.43
Interest	.95
TOTAL DUE	$64.38

Dear Mr. Young Bear:

We acknowledge receipt of your 1972 amended return and your earning statement for 1973.

In order to be exempt from taxation you must meet the following criteria.

1. Be an enrolled member of a tribe.
2. Live and work within the exterior boundaries of the same tribal reservation of which you are an enrolled member.

Since Mr. Young Bear is enrolled by the Fort Berthold Agency and working on the Fort Peck Reservation, he is taxable on his entire income.

We have prepared a return in his behalf which reflects a tax due of $64.38. We have also prepared a return for Mrs. Young Bear which reflects a refund of $41.30 which she will receive in the near future.

We are unable to complete the audit of your 1972 return until we receive your earning statement to substantiate the $241.83 withheld.

Please attach your remittance and requested earning statement to the enclosed copy of this letter and return to this office within the next thirty (30) days.

Very truly yours,

DEPARTMENT OF REVENUE

/s/ Ruth O. Rowlan
Ruth O. Rowlan, Auditor
Income Tax Bureau

ROR:drs

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-825

MERCY N. CLINCHER, ET AL,

Petitioners.

v.

THE UNITED STATES AND THE STATES OF ARIZONA AND MONTANA,

Respondents.

RESPONDENT ARIZONA'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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I N D E X

	Page
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	11
REASONS WHY THIS WRIT SHOULD BE DENIED	14
1. Petitioners Do Not Have A Cause of Action Against the United States For Amounts Withheld As State Income Taxes	14
2. Court of Claims Decision Not in Conflict With Acts of Congress and Other Decisions of United States Courts	23
CONCLUSION	26

CITATIONS

Cases:	Page
Aetna Casualty & Surety Co. v. Port of New York Authority 182 F.Supp. 671 (S.D.N.Y. 1960)	19
American Fidelity Co. v. Delaney 114 F.Supp. 702 (D.C. Vt. 1953)	18
Grasso v. Oehmann 54 A.2d 570 (D.C. Mun.Ct.App. 1947)	18
McClanahan v. Arizona State Tax Commission 411 U.S. 164 (1973)	4
United States v. Crossland Construction Co. 217 F.2d 275 (1954)	18

Statutes:

Arizona Revised Statutes:

§ 43-188	4,20,22
§ 43-188(f)	4
§ 43-188(g)	9
§ 43-188(h)	11
§ 43-188(i)	11

Statutes--Continued Page

United States Code:

4 U.S.C. §§ 105-110 25,26

5 U.S.C. § 5517 2,11,12,14,20, 21,22,23,24,26

5 U.S.C. § 5517(b) 21,22

Rules:

Rule 19, Rules of Supreme Court 23

Legislative Materials:

Senate Report 1309, U.S. Code Cong. Admin. News, p. 2360 (82d Cong. 2d Sess., 1952) 16

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The Respondent State of Arizona replies to the Petitioners' Writ of Certiorari to review the judgment of the United States Court of Claims in this case.

QUESTION PRESENTED

Whether the United States is liable for amounts it withheld from the wages of federal employees for state income taxes which the United States paid to the states where the employees are American Indians and the incomes were earned from employment within the boundaries of Indian Reservations located within the boundaries of the taxing states.

STATUTES INVOLVED

The Withholding Act, Act of July 17, 1952, ch. 940, 66 Stat. 765, as amended by the Act of September 6, 1966, ch. 55, 80 Stat. 478-79 (5 U.S.C. § 5517), provides:

> "§ 5517. Withholding State income taxes
>
> "(a) When a State statute --
>
> "(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State; and

"(2) imposes the duty to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. The agreement may not apply to pay for service as a member of the armed forces.

"(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency.

"(c) For the purpose of this section, 'State' means a State or territory or possession of the United States."

A.R.S. § 43-188 (f), (g), (h) and (i) as in effect prior to 1973 amendments read as follows:

"43-188. COLLECTION OF TAX - INFORMATION AT SOURCE: WITHHOLDING TAX

. . . .

(f) WITHHOLDING TAX

(1) On and after January 1, 1970, every employer at the time of the payment of wages, salary, bonus or other emolument to any employee whose compensation is for services performed within this state shall deduct and retain therefrom an amount equal to ten per cent of the total amount of the federal income tax deducted and withheld by an employer from the total value of such wages, bonus or other emolument of an employee under the provisions of the internal revenue code of the United States computed without deductions for any amount withheld, and shall, quarterly, on or before the last day of April, July, October, and January of each year, pay over to the commission the amount so collected during the preceding calendar quarter. For the purposes of this section the term 'employer' means the person for whom an individual performs or performed any service, of whatever

nature, as the employee of such person including any officer or department of the state or any political subdivision or agency of the state, or any city organized under a charter, or any political body not a subdivision or agency of the state, except that if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' means the person having control of the payment of such wages.

(2) The amounts deducted from the wages of an employee during any calendar year in accordance with the provisions of this subsection shall be considered to be paid in part payment of the tax on such employee's taxable income for his tax year which begins within such calendar year, and the return made by the employer pursuant to paragraph (5) may be accepted by the commission as prima facie evidence of the amounts so deducted from his wages.

(3) No amount shall be deducted or retained from:

(A) Wages paid for active service in the military or naval forces of the United States.

(B) Wages or salary paid to an employee of a common carrier when such employee is a nonresident of

Arizona as defined in section 43-101 and regularly performs services both within and without the state of Arizona.

(C) Wages paid for domestic service in a private home.

(D) Wages paid for casual labor not in the course of the employer's trade or business.

(E) Wages paid to part-time or seasonal employees whose services to the employer consist solely of labor in connection with the planting, cultivating, harvesting or field packing of seasonal agricultural crops, except such employees whose principal duties are operating any mechanically driven device in such operations.

(4) In the case of nonresident employees who are residents of another state of the United States or the District of Columbia and are allowed a tax credit for income taxes paid to their state of residency or domicile under the provisions of section 43-128(b)(1) sufficient in amount to offset the tax required by this section to be withheld from the wages of an employee, the tax commission may by rules and regulations relieve the employers of such employees from withholding requirements of this section with respect to such employees.

(5) When the total amount deducted under this subsection exceeds the amount of the tax on the employee's entire taxable income as computed under this title, the commission shall, after auditing the annual return filed by the employee in accordance with section 43-142, and without requiring a filing of a refund claim as provided in section 43-184(b)(1), refund the amount of the excess deducted, without interest thereon. Failure of the commission to make such refund shall not limit the right of the taxpayer to file a claim for a refund as provided in section 43-184. No refund shall be made to an employee who fails to file such return within one year from the due date of the return in respect of which the tax withheld might have been credited. If the excess tax deducted is less than one dollar, no refund shall be made unless specifically requested by the taxpayer at the time such return is filed. In no event shall any excess be allowed as a credit against any tax accruing on a return filed for a year subsequent to the year during which such excess was withheld, the provisions of section 43-184 notwithstanding.

The commission may make separate refunds of withheld taxes upon request by a husband or wife who has filed a joint return, the refund payable to each spouse being proportioned to the gross earnings of

each shown by the information returns filed by the employer or otherwise shown to the satisfaction of the commission. If a taxpayer entitled to a refund under this subsection dies, the commission may certify to the commissioner of finance that the refund be made to the taxpayer's executor, administrator, or duly appointed representative.

(6) Every employer shall, with each payment made by him to the commission, deliver to the commission a return in the form prescribed by the commission, showing the total amount of wages, salaries, bonuses or other emoluments paid to his employees, the amount deducted therefrom in accordance with the provisions of this subsection, and such other information as the commission may require. The employer is charged with the duty of advising the employee of the amount of moneys withheld, in accordance with such regulations as the commission may prescribe, using printed forms furnished by the commission for such purposes, or when requested by the employer upon forms approved by the commission.

The employer shall make an annual return for the calendar year to the commission on forms provided by it, summarizing the total compensation paid and the tax withheld for each

employee during the calendar year and shall file the same with the commission before February 16 of the year following the year for which the report is made. The return required in the preceding sentence shall contain or be verified by a written declaration that it is made under the penalties of perjury, and the information contained in said return shall satisfy the requirements of section 43-188(b) relating to the salaries and wages included in the report required under this paragraph.

The employer shall, within thirty days after the end of each calendar year, furnish such employee with either a statement of the amount withheld during the previous tax year, showing the gross earnings and the amount of tax withheld, or, if the termination of employment is prior to the end of the year, then, within fifteen days after the termination of employment, a summary statement showing the total earnings for the tax year and the amount of taxes withheld from compensation.

(g) LIABILITY FOR FAILURE TO WITHHOLD; PENALTY FOR FAILURE TO REMIT

(1) The employer shall be liable to the tax commission for the payment of the tax required to be deducted and withheld under this section, and the employee shall not thereafter be liable for the amount of any such payment, nor shall the

employer be liable to any person or any employee for the amount of any such payment. For the purpose of making penalty sections of this title applicable, any amount deducted or required to be deducted and remitted to the commission under this section shall be considered the tax of the employer and with respect to such amounts he shall be considered as a taxpayer.

(2) Whenever any employer is required to collect or withhold the tax imposed by this title from any employee and to pay such tax over to the tax commission, the amount of tax so collected or withheld shall be held to be a special fund in trust for the state of Arizona. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

(3) Any employer intrusted with, or having in his control any tax required to be collected or withheld and constituting a 'special fund in trust for the state of Arizona' pursuant to this subsection, who fraudulently appropriates, or secrets with a fraudulent intent to appropriate, to any use or purpose not in the due and lawful execution of the trust, pursuant to this section, any portion thereof, shall be guilty of

embezzlement under section 13-682, and shall be punishable as provided in sections 13-688 and 13-689.

(h) WITHHOLDING AGENT, MUST PAY WITHOUT RESORTING TO ACTION. Any person required to withhold and transmit any amount pursuant to this section shall comply with the requirement without resort to any legal or equitable action in a court of law or equity.

(i) WITHHOLDING TAX, REFUND THEREFOR. Any taxpayer from whom a tax is collected by withholding under this title is entitled to the remedies set forth in sections 43-163(b), 43-175(1), 43-184 to 43-186 and 43-195(c) except where such sections are in conflict with this section."

STATEMENT OF THE CASE

Each of the Petitioners is an Indian resident of an Indian Reservation on which he was employed by the United States. Pursuant to the provisions of the Withholding Act of 1952, 5 U.S.C. § 5517, authorizing the withholding of State income taxes from the wages of Federal employees, statutes of Montana

and Arizona imposing a duty of withholding on employers generally, and agreements with those States providing for such withholding, the United States withheld State income taxes from the wages of these Federal employees and paid such withheld sums to the States of Arizona and Montana. Six of the Petitioners were residents of, and employed on Indian Reservations in Montana and one of the Petitioners was a resident of and employed on an Indian Reservation in the State of Arizona.

The Petitioners sued the United States to recover the amounts withheld and paid over to Arizona and Montana. The Petitioners also sued on behalf of all other American Indians similarly situated to recover amounts withheld from their wages under 5 U.S.C. § 5517 and State statutes authorizing withholding

and agreements entered into pursuant thereto.

The United States interpleaded as third party defendants, the States of Montana and Arizona. The Petitioners and the United States each moved for summary judgment with the United States also praying that any judgment against it be made a judgment against the States of Montana and Arizona. Montana and Arizona moved to dismiss on the grounds of failure to state a claim upon which relief can be granted or alternatively on the ground of lack of jurisdiction. The United States Court of Claims granted the motions of the United States and the States and dismissed the case on the grounds that Petitioners did not have a claim for which relief could be granted. The Petitioners moved for rehearing. The Court issued an order denying the motion for rehearing and changing two sentences in its opinion.

REASONS WHY THIS WRIT SHOULD BE DENIED.

1. Petitioners Do Not Have a Cause Of Action Against the United States For Amounts Withheld As State Income Taxes.

The Petitioners claim in this case is based on its construction of 5 U.S.C. § 5517, the statute regulating the withholding of state income taxes of United States Government employees. The particular language of the statute which the Petitioners rely on as is indicated by the emphasis in the quotation of the statute on page 3 of their Petition is "in the case of employees of the agency who are subject to the tax." In considering its meaning, that phrase should not be isolated from the remaining language of the statute, but rather it should be read in para materia with the other provisions of this statute. The statute also

provides "this section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers . . . ."

Another provision of that statute to be reconciled with the language the Petitioners rely on is "This section does not give the consent of the United States to the application of a statute . . . which subjects the United States or its employees to a penalty or a liability because of this section." From that language it is apparent that Congress foresaw the possibility of becoming involved in State tax disputes through the withholding of State income taxes and that language was utilized to avoid that result. The Petitioners'

position does not give any effect to this statutory language which was designed to avoid United States involvement in state tax disputes.

In Senate Report 1309, U.S. Code Cong. Admin. News, p.2360 (82d Cong., 2d Sess., 1952), the Report of the Senate Committee states that the Government shall comply with the requirements of State income tax withholding statutes with respect to employees subject to the tax and immediately after that the following sentence appears in the Report: "The bill further provides that nothing in the Act shall be deemed to consent to the application to the United States of any provision of any statute which has the effect of subjecting the United States to any liability." Thus, avoidance of liability for claims of wrongful withholding was an overriding requirement and there is

therefore no inconsistency between the language that the Petitioners rely on and the language of the remainder of the statute. This statute does not indicate whether remedies of the employee would include an action to enjoin the United States from the collection of the tax or an action against the state for the refund of the taxes, but it most certainly indicates that one remedy the Petitioners do not have is an action against the United States for wrongful withholding of state income taxes where a State has a statute providing for such withholding.

This construction of the statute is certainly confirmed by the decisions of the courts relating to United States income tax withholding statutes. When an employer withholds tax from an employee's wages and pays him the balance,

the employee has been paid in full and the employer then has the tax liability. The employer alone is then liable to the United States for the tax collected. United States v. Crossland Construction Co., 217 F.2d 275 (1954); American Fidelity Co. v. Delaney, 114 F.Supp. 702 (D.C., Vt. 1953).

Where tax withheld by an employer was not paid over to the United States, it was held that the employee had no right to bring an action against the employer for return of the tax. The employee was entitled to a credit on his tax for any amounts withheld even though such amounts were not paid over to the Government. Grasso v. Oehmann, 54 A.2d 570 (D.C.Mun.Ct.App. 1947).

Another case indicating that the employee does not have a cause of action against the United States for income

taxes "wrongfully withheld" is Aetna Casualty & Surety Co. v. Port of New York Authority, 182 F.Supp. 671 (S.D.N.Y. 1960). In that case the employer failed to remit amounts withheld from wages of employees for Federal income taxes. The Court held that under those circumstances the employees did not have a claim for the amounts withheld and that the Government did not have a claim against the surety on a performance bond of the defaulting contractor that the contract was breached by a failure to pay wages because of the construction contractor's failure to remit the amount deducted for withholding taxes. The Court noted that this argument of wrongful failure to pay wages has been repeatedly rejected in other cases.

Although the cases establishing this theory have arisen in connection with the performance of Government contracts, there is no valid reason why the same statutory language should have one meaning for purposes of Government contracts and an entirely different meaning for purposes of State income tax claims. In these cases the Court has reasoned that the employer was the agent of the Government for the purposes of collecting the tax and payment of the tax to the agent or withholding by the agent constituted payment of the tax to the Government discharging the employee of liability for the tax. Applying that reasoning to this analagous situation, when the United States withholds State income taxes under 5 U.S.C. § 5517 and State statutes such as A.R.S. § 43-188 which are patterned after the

Internal Revenue Code withholding provisions, the United States is the agent of the State for the purpose of collecting that tax. Withholding by the United States therefore constitutes payment of the tax by the employee. Any remedy of the employee in regard to refund of the amount withheld under 5 U.S.C. § 5517 is against the taxing authority rather than against the employer who is merely the agent of the taxing authority.

When Congress provided in 5 U.S.C. § 5517(b): "This section does not give the consent of the United States to the application of a statute . . . which subjects the United States or its employees to a penalty or liability because of this section" that is literally what Congress intended. It was the desire of Congress to cooperate with the States in enacting 5 U.S.C. § 5517, but Congress

but did not want to assume the obligation of indemnifying its employees to the extent of any loss incurred by them because of unconstitutional action on the part of State tax administrators. Congress simply did not want the United States to become involved through 5 U.S.C. § 5517 in disputes between its employees and State taxing authorities.

The decision of the Court of C'aims is consistent with the language of 5 U.S.C. § 5517(b) which expressly prohibits this cause of action; with the language of Arizona Revised Statutes, § 43-188, the provisions of the Internal Revenue Code after which that section is patterned and the case law construing those provisions of the Internal Revenue Code. Employers are not compensated for withholding State or Federal income taxes. To saddle these employers with the risk

of liability because of disputes between taxpayers and taxing authorities would unduly increase their uncompensated burdens under the withholding statutes and thus multiply the problems of compliance with the withholding laws upon which so much of the state and federal revenues depend. Accordingly, the provisions of 5 U.S.C. § 5517 prohibiting this type of action should not be construed into a nullity.

2. Court of Claims Decision Not In Conflict With Acts of Congress And Other Deicisions of United States Courts.

Under Rule 19 of the Rules of the Supreme Court, certiorari is granted only where there are special and important reasons, such as a conflict of a decision with other decisions or statutes. Here no such conflict has been demonstrated. The decision of the Court of Claims is

perfectly consistent with the relevant Acts of Congress and other decisions of United States courts and it relates only to an event that will not recur.

The Petitioners contend that the Court of Claims decision undercuts a decision of this Court in McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973). The Court of Claims decision does not have that effect because of very substantial differences between the two cases. In this case there is an adequate remedy in the state courts whereas there was none in the McClanahan case. The issue in this case is the construction of 5 U.S.C. § 5517 rather than the question of whether Indians are liable for State taxes. The sole purpose of the suit in the United States Court of Claims was to circumvent State statutes of limitation. Since the Petitioners have

an adequate remedy in the State courts and the only purpose of the suit in the Court of Claims was to circumvent the State statutes of limitation, the Court of Claims decision is not in conflict with Federal congressional policies concerning freedom of reservation Indians from State obligations or with congressional policy of preferential employment.

The Petitioners contend that the decision of the Court of Claims ignores the Buck Act. The Buck Act, 4 U.S.C. §105 - § 110 is not applicable to this case. Under the Buck Act, the State tax law remained unchanged as to Indians. That is the purpose of Section 109 of the Buck Act which provides:

> "Nothing in Sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

There is a profound difference between a statute such as the Buck Act which in substance provides that the tax status of Indians is to remain unchanged and a statute which would carve out an exception to the provision of 5 U.S.C. § 5517 that the United States does not give its consent to the application of a statute which subjects the United States to liability because of compliance with State withholding requirements.

CONCLUSION

Since the decision of the Court of Claims is not in conflict with other decisions of the United States courts and since it is not in conflict with Acts of Congress, this writ should not be granted.

Respectfully submitted,

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The Attorney General

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Assistant Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 1975, three copies of the RESPONDENT ARIZONA'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS were air-mailed postage prepaid to Richard A. Baenen, Esq., 1735 New York Avenue, N.W., Washington, D.C. 20006, Attorney for Petitioners.

I further certify that all parties required to be served have been served.

BRUCE E. BABBITT
The Attorney General

James D. Winter

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State of Arizona

Subscribed and sworn to before me this 31st day of January, 1975.

Iris A. Harris (nee Roberts)
Notary Public

My Commission expires:
My Commission Expires Aug. 13, 1976

FEB 4

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-vs-

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Respondents' Brief in Opposition

TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	2
Statement of the Case	2
Reasons For Denying the Writ	2
Summary	7
Conclusion	9
Counsel of Record	10

TABLE OF AUTHORITIES

CASES:	Page
Abernathy v. Carpenter, 373 U.S. 241, aff'g 208 F. Supp. 793 (W.D. Mo. 1962)	5
Baron v. O'Sullivan, 258 F. 2d 336 (3d Cir. 1958)	8
Bussie v. Long, 5th Cir. (1967), 383 F. 2d 766	6
Carson v. Warlick, 238 F. 2d 724 (4th Cir. 1956), Cert. denied, 353 U.S. 910 (1957)	8
Gilchrist v. Interborough Rapid Transit, 279 U.S. 159 (1929)	8
Gray v. Morgan, 7th Cir. (1966), 371 F. 2d 172, Cert. denied 386 U.S. 1003	6
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293	6
Lynch v. Household Finance Corp., 405 U.S. 538, 542, Footnote 6 (1971)	6
McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)	2, 6, 7
Porter v. Investor's Syndicate, 286 U.S. 461 (1932) aff'd on rehearing, 287 U.S. 346 (1932)	8
OTHER:	
4 U.S.C. §§101, et seq. (61 stat. 641)	6
5 U.S.C. §5517 (66 stat. 765)	3, 5, 6, 7
REVISED CODES OF MONTANA 1947:	
84-§4502	5
84-§4922	5, 8
84-§4923.1	5, 8
84-§4947	4, 7
93-§8901	5
ARIZONA REVISED STATUTES:	
43-§184(b)(1)	8
43-§186(b)	8
43-§188(g)	4, 7

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TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Claims, not reported, appears in the appendix of Petitioners' Petition. The Order of the Court amending the opinion, not reported, appears in the appendix of Petitioners' Petition.

STATEMENT OF THE CASE

Plaintiffs are seven American Indians suing on their own behalf and on behalf of all other American Indians similarly situated on Indian Reservations in the state of Montana and in other states of the Union, seeking recovery of moneys earned by plaintiffs for services performed as employees of the United States on designated Indian Reservations. The moneys were withheld by the United States from Plaintiffs' wages pursuant to the Withholding Act of 1952, infra, and paid over to either the state of Montana or the state of Arizona for income taxes claimed by the states.

The United States inter-pleaded as third party Defendants the states of Arizona and Montana. The Indians and United States each moved for Summary Judgment with the United States also praying that any Judgment against it be made a Judgment against the two states. The states moved to dismiss.

The Court of Claims granted the Motions of the United States and the states and dismissed the case. The Indians moved for a rehearing and the Motion was denied.

REASONS FOR DENYING THE WRIT

A. The holding of the Court of Claims does not undercut the decision of this Court in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)

Answering Petitioners' first reason for granting the Writ, i.e., that the holding of the Court of Claims undercuts the decision of this Court in *McClanahan v. Arizona*

State Tax Commission, 411 U.S. 164 (1973), the Court of Claims properly decided that whether or not individual Indians are subject to state taxation was not the issue to be decided. The question before the Court of Claims was whether or not the United States should be liable for withholding taxes that might ultimately be found to have been not collectible by the states. The controlling law is to be found in 5 U.S.C. §5517 (Codifying the Withholding Act of July 17, 1952, ch. 940, 66 STAT. 765, as amended by the Act of September 6, 1966, ch. 55, 80 STAT. 478-79) which provides as follows:

"§5517. WITHHOLDING STATE INCOME TAXES

(a) When a State statute—

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State; and

(2) imposes the duty to withhold generally with respect to the pay of employees who are residents of the state;

The Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. * * *

(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency."

As is evident from subsection (b) of the statute, Congress could not have intended this provision to be interpreted so as to impose a greater burden on the United States than that imposed on a private employer. The Court properly held the United States not liable for withholding of the moneys in question when a private employer could not be under either Arizona or Montana law. Such liability is expressly eliminated by Arizona Revised Statutes §43-188 (g), and Revised Codes Montana §84-4947:

Ariz. Rev. Statutes, §43-188

"(g) Liability for failure to withhold; penalty for failure to remit.

(1) The employer shall be liable to the tax commission for the payment of the tax required to be deducted and withheld under this section, and the employee shall not thereafter be liable for the amount of any such payment, *nor shall the employer be liable to any person or any employee for the amount of any such payment.* For the purpose of making penalty sections of this title applicable, any amount deducted or required to be deducted and remitted to the commission under this section shall be considered the tax of the employer and with respect to such amounts he shall be considered as a taxpayer. *(Emphasis supplied).*

Rev. Code of Montana, §84-4947

"84-4947. Amount withheld considered as tax collected. All amounts deducted and withheld shall be considered as a tax collected under the provisions of this act, and *no employee shall have any right of action against his employer in respect to any moneys so deducted and withheld from his wages* and paid to the state of Montana in compliance or intended compliance with this act." *(Emphasis supplied.)*

B. *This case presents an important question of general application to a substantial segment of American Indians.*

To be sure, however, the decision of the Court of Claims, by recognizing the requirement imposed upon the United States by 5 U.S.C. §5517, supra, to withhold sums from the compensation of employees, in no way interferes with the preferential right of employment of Indians nor their right to be free from state taxation. The decision below does not say they are denied relief in this regard, but only that their remedies, if any, must be commenced in the proper forum, i.e., their respective state courts. The Plaintiffs have ample opportunity to contest any state taxes they deem improper by pertinent statutes of Montana and Arizona. In granting the third party Defendants' states of Arizona and Montana Motions to Dismiss, the Court of Claims properly recognized its lack of jurisdiction with respect to determining the liability of Indians to state taxation in that Plaintiffs have totally failed to embark upon and exhaust their administrative remedies in the states of Montana and Arizona. An aggrieved taxpayer under Montana income tax laws may apply to the State Department of Revenue and may appeal its decision to the State Tax Appeals Board under §84-4922, R.C.M. 1947. Any decision rendered by the Department of Revenue may be reviewed by a Montana District Court and the Montana Supreme Court under §84-4923.1, R.C.M. 1947. In addition, under the provisions of §84-4502, R.C.M. 1947, a taxpayer may pay his Montana individual income taxes under protest and thereafter bring an action in Montana Courts for determination of all issues. Finally, the Montana income taxpayer may bring a declaratory action in a Montana District Court under §93-8901, R.C.M. 1947, on any rights asserted under this Complaint. All of the decisions rendered by Montana District Courts may be appealed to the Supreme Court of Montana, and any issue properly raised to the Supreme Court of Montana is subject to final review by the United States Supreme Court. Federal Courts have held that state remedies like those of the State of Montana, provide a plain, speedy and efficient remedy. *Abernathy v. Carpenter*, W.D. Mo. (1962), 208 F. Supp. 793, aff'd 373 U.S. 241, 83 S.C. 1295, 10 L. Ed. 2d

409 1963); *Gray v. Morgan*, 7th Cir. (1966), 371 F. 2d 172, Cert. denied 386 U.S. 1033; *Bussie v. Long*, 5th Cir. (1967), 383 F. 2d 766; and *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 63 S.C. 1070, 87 L. Ed. 1407 (1943). The Supreme Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542, fn 6, has specifically recognized that Congress does not favor Federal judicial interference with enforcement of state tax laws, and has repeatedly barred anticipatory Federal adjudication of the validity of state tax laws.

C. The decision of the Court of Claim is erroneous and ignores the Buck Act and misapplies the Withholding Act.

The Court below properly concluded "what we have here is a case where the collection of a refund of any excess of withholding over tax liability is entirely between the taxpayer and the state." (Opinion below at 6 a). Neither the *Buck Act*, 4 U.S.C. §§101 et seq., nor *McClanahan v. Arizona State Tax Commission*, supra, were ignored by the Court. The *Buck Act* simply does not represent the controlling statutory language. The question to be decided by the Court was not whether the individual Indians were subject to the tax, or whether the states withheld taxes contrary to the holding in *McClanahan:* rather the Court properly focused on the issue in the case which was whether or not the United States should be liable for withholding amounts from the wages of Federal employees for state income taxes. In its decision, it properly interpreted and applied the Withholding Act (See 5 U.S.C. §5517 supra), concluding the United States to be not liable for withholding the moneys in question (See para. A above).

D. The Court of Claims erred when it relegated reservation Indians to state jurisdiction.

Plaintiffs' claim that they were deprived of the Court of Claims six year statute of limitations is to say they were deprived of a remedy to which they were never entitled. By granting third party Defendants' Motion to Dismiss

and holding that the matter was entirely between the taxpayer and the states, it is axiomatic that state statutes of limitations are controlling.

Petitioner's complaint that the Court of Claims holding will compel numerous Indians to initiate suits in more than one state is to completely ignore the cogent reasons behind the Court of Claim's decision to deny the petitioners a class action status. As the Court stated (opinion below at 2a). "It is certainly fairer to the members of the class not to invite them on board a sinking ship, * * *".

This Court's decision in *McClanahan*, supra, dealt with a specific reservation (Navajo), and a specific situation where the Indian that resided on the reservation was a member of that reservation, and earned money working on the reservation. All the named Plaintiffs in this case do not fit this description and several different reservations are involved. Thus, the possibility exists that some states will construe *McClanahan* more narrowly and put into issue different matters depending upon the state, the reservation involved, and the working and living situation of the particular Indian. Hence, the Court's decision to deny the request for class action status, properly reasoning that the normal and presently ongoing pursuit of refund claims before state agencies and Courts appeared cleaner, simpler and more economical.

SUMMARY

In summary, it is the contention of the Respondent, State of Montana, that:

(1) The Court properly granted judgment to the United States for the reason that the controlling statutes, both federal and state, relieve the United States, or any employer similary situated, from liability for withholding sums from the pay of employees and making returns of the sums to the state (5 U.S.C. 5517; Revised Codes of Montana §84-4947; Arizona Revised Statutes §43-188, supra).

(2) The Court properly granted the states of Arizona and Montana motions to dismiss for the reason that, in the absence of evidence that the Plaintiffs have exhausted their state administrative remedies, a Federal Court is precluded from granting them relief. *Gilchrist v. Interborough Rapid Transit*, 279 U. S. 159 (1929); *Porter v. Investors Syndicate*, 286 U.S. 461 (1932), aff'd on rehearing, 287 U.S. 346 (1932); *Carson v. Warlick*, 238 F. 2d 724 (4th Cir. 1956) cert. denied, 353 U.S. 910 (1957); *Baron v. O'Sullivan*, 258 F. 2d 336 (3d Cir. 1948). In the case at bar, the Plaintiffs have never filed a claim for a refund with either of the state taxing authorities. As stated by the Court (Opinion below at 6a), in both states a taxpayer is required to file a claim for refund with a state administrative taxing authority. A condition to a taxpayer's obtaining judicial review in both states is *inter alia* a denial of the taxpayer's claim for refund by the administrative taxing authority. Citing Ariz. Rev. Statutes §§43-184(b)(1), 43-186(b); Rev. Codes of Montana §84-4922, 84-4923.1.

CONCLUSION

For the foregoing reasons the State of Montana respectfully requests the Court to deny Petitioners' Application for Writ of Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-825

MERCY N. CLINCHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioners are seven American Indians who are, or were, employed by the United States on Indian Reservations. After *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, in which the Court held that the State of Arizona could not tax income earned by Indians on their reservations in the State, petitioners brought this suit in the Court of Claims to recover from the United States moneys that had been withheld by the United States from their wages prior to *McClanahan*, and paid over either to the State of Montana or to the State of Arizona pursuant to 5 U.S.C. 5517 for income taxes claimed by the States. Petitioners had not previously protested the withholding and have made no attempt to recover these moneys from the States of Arizona or Montana (Pet. App. A 8a). No funds withheld after *McClanahan* are at issue.[1]

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[1]After that decision, the withholdings ceased (Pet. App. A 2a).

The United States interpleaded the States of Arizona and Montana as parties defendant (Pet. App. A 2a, see against the states under state law and that petitioners' we rely (Pet. App. A), granted the government's motion for summary judgment and dismissed the third party claim against the two States. The court took note of this Court's decision in *McClanahan* but found that under Arizona and Montana law a private employer would not be liable for income taxes erroneously withheld from an employee's wages and paid to the State (Pet. App. A 4a-6a). The employee's remedy would be against the state which received the withheld moneys (*id.* at 6a-8a). The court concluded that Congress, in enacting 5 U.S.C. 5517, did not impose a greater burden on the United States than that imposed by local law on private employers (*id.* at 5a-6a), that petitioners must bring their action against the states under state law and that petitioners' remedy would then be in a state administrative proceeding (*id.* at 7a-8a).

This conclusion is fully supported by the language of 5 U.S.C. 5517(b), particularly since that subsection specifically provides that nothing in Section 5517 gives consent to application of a statute imposing a "penalty or liability on the United States" as a result of its withholding of wages for state taxes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General

FEBRUARY 1975.